BREACH OF CONTRACT DUE TO WAR

"The war has in a different degree, perhaps, affected the performance of many, if not the larger part of outstanding and unexecuted contracts between citizens of the United States; yet it would be a strong proposition to say that all such contracts are thereby rendered void, or voidable at the option of the losing party."[1]

This statement of *what the law is not* is essentially a challenge to lawyers to phrase, if they can, a statement of what the law is. In response to this challenge this article is written.

It is evident that while peace is normality, yet its continuance cannot be deemed an implied condition of all contracts. Even though each party find himself upon the outbreak of war an alien enemy as regards the other, still that circumstance, it has been held,[2] may merely suspend the contract and does not necessarily terminate it.[3] *A fortiori* contracts between persons to whom the outbreak of war has not given the mutual relationship if enemies are not necessarily released from their obligations by the cessation of peace. The endeavor of this article will be to trace, through the most recent cases in England and in this country, the rules of law which determine whether or not war and its consequences have so affected a contract as to justify its non-performance; and to mould into rational conclusions the wealth of raw material which decisions handed down in the last eighteen months have made available.[4]

I. War as a General Causative Force Interfering with Performance

War has never been considered of itself an excuse for non-performance.[5] It is not acknowledged by the text-writers as a

[1]Columbus Ry. Power & Lt. Co. *v.* City of Columbus (1918) 253 Fed. 499, 507.

[2]Halsey *v.* Lowenfield (1916) 2 K. B. 707.

[3]Contracts with enemies are beyond the scope of this article; reference may be had to Picciotto, Alien Enemy Persons, Firms and Corporations in English Law, 27 Yale Law Journ. 167; and C. H. Hand, Jr., The Trading With the Enemy Act, 19 Columbia Law Rev. 112.

[4]Since the armistice there has been a rush to the courts in search of relief from war losses which, while the conflict lasted, the parties seemed content to bear philosophically.

[5]An exception to this rule is found, to be sure, in cases where performance of the contract, while still possible, would be attended by danger of injury to the parties or to the subject matter of the contract from

separate category among such excuses. Its operation is dependent upon its rendering performance impossible as a matter of law, or illegal. Impossibility as a matter of law results from such a change of circumstances, or such events, that no conceivable combination of happenings can resurrect the possibility of performance: *e. g.*, death of one who has contracted to sell his services; destruction of the subject matter of sale. It also results when the change of circumstances has rendered a literal performance of the contract essentially different from what both parties contemplated. A contract, fairly and voluntarily made, has in it an element of equality between two opposing considerations,—the goods, let us say, and the price. If the balance is violently disturbed, that is, if for some reason the execution of the contract by one party would confer no benefit on the other, or would impose enormous burdens on the party performing, then the state of impossibility as a matter of law is approached.

The difficulty about defining this second source of impossibility as a matter of law lies in the fact that it depends upon matters which, so far as the express terms of the contract are concerned, are collateral. It depends, in other words, on events affecting persons other than contracting parties or on things other than the things sold or otherwise dealt with in the contract. This

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warlike operations. A seaman's contract entered into in time of peace may be terminated if the outbreak of war finds the vessel at a foreign port, the waters to be traversed on the voyage home being infested with enemy warships. Liston *v.* Steamship Carpathian (1915) 2 K. B. 42. Accord, The Epsom (1915) 227 Fed. 158; see also The Kronprinzessin Cecilie (1917) 244 U. S. 12, 37 Sup. Ct. 490. In such maritime contracts the continuance of peace is an implied condition. *Cf.* Berthoud *v.* Schweder & Co. (1915) 31 T. L. R. 404, *infra,* footnote 12. The rules to be observed in applying the doctrine of implied conditions are set forth in Trotter, Contracts During and After War (3rd ed.) 134; see also Lord Parker's opinion in Tamplin S. S. Co., Ltd. *v.* Anglo-Mexican Petroleum Products Co., Ltd. (1916) 2 A. C. 397, 422.

The rule of exposure to hostile attacks as effecting a dissolution of the contract is confined to maritime contracts. If an actor has undertaken to go to Australia, the increase in perils attending the voyage due to enemy activity will not justify non-performance of the undertaking. Foster's Agency *v.* Romaine (1916) 32 T. L. R. 331, reversed on another point, 32 T. L. R. 545.

That a man has been drafted does not make him liable to his former employer for breach of contract. Marshall *v.* Glanvill (1917) 2 K. B. 87. Moreover, it has been held that, from the time a drafted man abandons his offices to be inducted into service, he ceases to be liable for rent no matter how long his lease still had to run. State Realty Co. *v.* Greenfield (1920) 62 N. Y. Law Journ. 1421, 110 Misc. 270.

In Piaggio *v.* Somerville (1919) 119 Miss. 6, 80 So. 342 the court refused to apply the doctrine of the Kronprinzessin Cecilie, *supra,* to neutral vessels.

second source—this "disturbed balance" theory—is illustrated by the line of decisions known as the "Coronation Cases." B undertook to buy and S to sell the privilege of using a balcony on a day named, the day on which it was expected that the coronation of King Edward VII would occur. The King's illness caused a postponement of the ceremony. S's balcony was at B's disposal all the day. Must B pay? The Coronation Cases[6] held he need not.[7] The cases are usually explained on the theory that there has been a failure of something which was at the basis of the contract in the mind and intention of the contracting parties.[8]

Returning to the balance metaphor, we come to the cases antithetical to the Coronation Cases, namely, cases where the balance is disturbed by an increase in burdens attendant upon one party's performance. To this type belong most of the cases wherein war has been the cause of a breach of contract. War effects a change in collateral circumstances, and the change in turn increases the burden of one party's performance. Two problems arise in consequence. One is to determine the degree of collateralness beyond which changes no matter how extensive will not affect the obligations upon the contract.[9] The other is to determine the seriousness of the increase in the burden which must have developed in order to excuse a breach.

A change in collateral circumstances is a defense only if it can be construed as a failure of an implied condition. Speaking of what sort of occurrences affecting the contract collaterally will excuse performance, Viscount Haldane (in a dissenting opinion)[10] said:

"The occurrence itself may * * * be of a character and

[6]Krell *v.* Henry (1903) 2 K. B. 740 is the leading case; the other cases are collected and reviewed in Blackburn Bobbin Co. *v.* Allen & Sons (1918) 1 K. B. 540, 543; and in Lindenberger Cold Storage & Canning Co. *v.* Lindenberger (1916) 235 Fed. 542, 549.

See also cases arising out of the abandonment of the international yacht races in 1914, e. g., Marks Realty Co. *v.* Hotel Hermitage Co. (1915) 170 App Div. 484, 156 N. Y. Supp. 179, holding advertiser not liable for price of "ad", inserted in program of the event.

[7]Contrast with cases in footnote 32, *infra.*

[8]Horlock *v.* Beal (1916) 1 A. C. 486, 512.

[9]Whether the performance which remains possible after the occurrence of the intervening event is a sufficiently close approximation to the original undertaking to prevent a dissolution is a question of degree. Moss *v.* Smith (1850) 9 C. B. 94, 103.

[10]Tamplin S. S. Co. *v.* Anglo-Mexican Petroleum Products Co. (1916) 2 A. C. 397, 406-407. On this particular point Viscount Haldane was not in conflict with the majority. See also Chicago, M. & St. P. Ry. *v.* Hoyt (1893) 149 U. S. 1, 14-15.

extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation."

A pair of contrasting cases illustrative of the implied condition doctrine is *London & Northern Estates Co.* v. *Schlesinger,*[11] and *Berthoud* v. *Schweder & Co.*[12] In the former case it was held that a lease of a dwelling was not dissolved by war though the tenant, who was an Austrian, was prevented by the Defense of the Realm Act from actually occupying the premises. Lush, J., observed that while personal occupancy was the purpose for which the tenant probably made the lease, yet it was not the "foundation of the contract". He thus distinguished *Krell* v. *Henry.*[13] In the *Berthoud* case the defendants, who were members of the Stock Exchange, agreed to pay the plaintiff a commission on all deals negotiated through him for execution on the Exchange, and they guaranteed him a certain minimum. The contract was to last from March to December, 1914, but from July 31, 1914 to January 4, 1915 the Stock Exchange, as a consequence of the outbreak of war, was closed. The court held that the plaintiff was not entitled to the guaranteed minimum for the period during which the Exchange was closed, on the ground that it was an implied term of the agreement to entitle the plaintiff to remuneration that the Stock Exchange should remain open.

Commercial unprofitableness caused by war is, of course, no excuse for failure to perform. It does not amount to impossibility nor to such a breach of implied conditions as constitutes frustration of adventure. This has been asserted repeatedly.[14]

In *Blackburn Bobbin Co.* v. *Allen & Sons,*[15] the defendant, who had undertaken early in 1914 to supply the plaintiff with

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[11](1916) 1 K. B. 20.

[12](1915) 31 T. L. R. 404.

[13]*Supra,* footnote 6.

[14]See statement of general principles in Arnold D. McNair, War-time Impossibility of Performance, 35 Law Quarterly Rev. 84, 96-98. To this rule certain exceptions must be admitted to exist. They are founded upon broad principles of equity and amount to this, that specific performance will be denied and the complainant left to his right to sue for damages, in cases where the outbreak of the war has put practically insuperable difficulties in the way of performance. A buyer will not be granted a decree of specific performance compelling seller to convey, if buyer is absolved by the Trading With the Enemy Acts of his domicile from the duty of paying the price until the end of the state of war. Lindenberger Cold Storage & Canning Co. *v.* Lindenberger (1916) 235 Fed. 542, 565.

[15](1918) 1 K. B. 540, aff'd. (1918) 2 K. B. 467.

lumber from Finland was not excused from performance on account of the war and the resulting scarcity of ships, although the contract contained a proviso that *force majeure* should excuse performance. McCardie, J., said:[16]

"My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle in *Krell* v. *Henry*,[17] even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfil his bargain.

"Just as it seems clear that a vendor is not absolved from the duty to deliver unascertained goods by reason of the destruction of his factory or warehouse, so a vendor is not relieved from his obligation in such a case as the present."[18]

In *Tennant's (Lancashire) Ltd.* v. *Wilson & Co.*,[19] the buyer of magnesium chloride sued the seller for non-delivery upon a contract which was made December 12, 1913, and which called for deliveries throughout 1914. The contract provided *inter alia:*

"Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

When the contract was made, the British market was in the habit of being supplied with 4,300 tons a year from British sources and 12,000 tons a year from German sources. The war cut off the German source of supply and the defendants-appellants suspended deliveries. The question was presented whether their conduct was justified by the clause quoted above. The House of Lords was convinced by the evidence that after buyers entitled to preference over the plaintiff had been supplied, not enough magnesium could be obtained in Britain to supply the plaintiff with the amount called for by the contract. They therefore reversed the Court of Appeal

[16](1918) 1 K. B. pp. 550, 551.

[17]*Supra,* footnote 6.

[18]See also Produce Brokers *v.* Weiss (1918) 118 L. T. R. 111.

[19](1917) A. C. 495.

and held that the breach was excused by the proviso. Lord Loreburn said:[20]

"The evidence in this case was given in a very confused way, but the conclusion of it is that the sellers could not have obtained enough of the chloride of magnesium during the relevant period of time to satisfy the requirements of their business even if they had paid the prices required, but that they could have obtained enough to satisfy their contract with the present respondents if they had disregarded other contracts, and other business necessities in order to satisfy the respondents. To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery."

This was his Lordship's minor premise. His major premise, however, being a universal statement, is the valuable part of the case. He said:[21]

"They had to show that the war caused a short supply of magnesium chloride which hindered delivery. By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirements. By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the sellers' control. The argument that a man can be excused from performance when it becomes 'commercially' impossible, which is forcibly criticised by Pickford, L. J.,[22] seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect."[23]

The American cases are united in holding that an increase in the burdens and expense of performance of contractual obligations due to war conditions neither terminates the contract nor excuses the breach.

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[20]*Ibid.*, p. 510.

[21]*Ibid.*, p. 510. This passage was quoted and its principles applied in Peter Dixon & Sons, Ltd. *v.* Henderson, Craig & Co. (1919) 2 K. B. 778, 786.

[22]Wilson & Co. Limited *v.* Tennants (Lancashire) (1917) 1 K. B. 208, 218.

[23]For further British cases in point see Trotter, Contracts During and After War (3rd ed.) 119. "An express unconditional contract is not, then, as a general rule, dissolved by its performance being or becoming quite impossible in fact owing to particular circumstances one of which is war." *Ibid.*, 121. And see Costigan, Performance of Contracts, 62-72.

In *Columbus Ry., Power & Light Co.* v. *City of Columbus*,[24] the complainant sought to enjoin the enforcement by the city of obligations assumed by the complainant in 1901 to operate cars for twenty-five years at a five-cent rate of fare. Owing to the war performance had ceased to be profitable. The court denied relief, on the ground that performance had not been rendered illegal nor impossible by any "superior force", the circumstance that the wages of complainant's employees had been increased by action of the War Labor Board affecting the possibility of profit rather than the possibility of performance.[25]

In *City of Moorhead* v. *Union Light, Heat & Power Co.*,[26] the complainant sought to enjoin defendant from ceasing to supply gas pursuant to a franchise; the defendant filed a cross-bill asking the court to declare that part of the contract fixing a maximum rate null and void on the ground that, owing to the war, profitable performance within the limits set was impossible. The court granted an injunction and dismissed the cross-bill, phrasing the general principles by which it was guided as follows:

"* * * In determining whether equitable relief should be granted with respect to a contract the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time it was to be performed. If at the time it was made the contract was fair and free from fraud, mistake or imposition, parties must be left free to make their contracts, and it is the duty of courts to enforce them as made."[27]

B. P. Ducas Co. v. *Bayer Co.*,[28] involved a contract to supply dyestuffs, the defendant being known to the plaintiff as the American agent of a German house. The contract, which was made June 10, 1914, provided that performance would be excused if prevented in fact by contingencies beyond seller's control. The European War broke out and the seller's source of supply was cut off. He thereupon prorated his remaining supplies between the

[24](1919) 249 U. S. 399, 39 Sup. Ct. 349, affirming (1918) 253 Fed. 499.

[25]See also Burr *v.* City of Columbus (1918) 256 Fed. 261, aff'd., (1919) 249 U. S. 415, 39 Sup. Ct. 354. These cases, to which may be joined Muscatine Lighting Co. *v.* City of Muscatine (1918) 256 Fed. 929, are illustrative of hardships arising out of long-term contracts fixed by franchise. The New York Court of Appeals has solved the problem by evolving a doctrine of temporary unconstitutionality. Municipal Gas Co. *v.* Public Service Com. (1919) 225 N. Y. 89, 96, 121 N. E. 772, 774.

[26](1918) 255 Fed. 920.

[27]*Ibid.*, p. 923.

[28](Sup. Ct. T. T. 1916) 163 N. Y. Supp. 32.

plaintiff and customers who made contracts subsequently to him. Held, (1) that war, though confessedly not within the actual contemplation of the parties, was a contingency beyond their control within the meaning of the contract; but (2) that the proximate cause of the default was not the war but the unjustified proration. The plaintiff was therefore allowed to recover.

That abnormal market conditions and inflated prices subsequently make unduly burdensome a prior order of the Public Service Commission reasonable when made, is no reason why such an order should not be enforced by mandamus.[29]

II. Affirmative Governmental Action Affecting Performance

Parties to a contract may find that performance is rendered impossible by the intervention of governmental action,[30] even though but for such action the contract was (in spite of war) capable of being performed. Impossibility here takes on a hue of illegality. "You need not perform", becomes "You shall not perform". What are the rights of the party to whom the prohibition is not addressed to recover damages from him to whom the prohibition is addressed? What are his rights if the government, instead of prohibiting performance, declares that performance will be allowed provided certain conditions are complied with? What are his rights if the government merely hinders performance in a general way, by disturbing market conditions, appropriating for its own use the raw materials essential to performance, etc.?

1. Prohibitions.

It is necessary to distinguish the cases where the prohibition operates to render it unlawful for one party to perform his bargain, from the cases where the prohibition operates to destroy the benefit which the party expected to receive as compensation for the burden of performing his side of the bargain. The case of *Federal Sign System* v. *Palmer*,[31] is useful for purposes of illustration. Plaintiff leased an electric sign to the defendant who under-

[29]Public Service Com. *v.* Brooklyn Hts. R. (1918) 105 Misc. 254, 172 N. Y. Supp. 790.

[30]Cases where governmental action has assumed the form of laws or proclamations against trading with the enemy are not treated herein. See *supra*, footnote 3.

[31](1919) 176 N. Y. Supp. 565.

took to pay a monthly rental. An order of the Fuel Administrator subsequently made it unlawful to light the sign except on Saturday nights. Held, this does not dissolve the contract nor absolve the defendant from the duty to pay the rental.[32] It is obvious that performance was not rendered illegal. Performance consisted in paying rent. But the expected reimbursement for that performance, the increase in the defendant's business from the display of his advertisement, was wholly lost. If S, a seller of goods, contracts with A, an advertising agent, that the latter will display S's name and place of business in electric lights, and A is prevented by the order of the Fuel Administrator from using electricity for such a purpose, A is not liable to S for breach of contract.[33]

If the parties contract for the sale by one and purchase by the other of an article for export from,[34] let us say, England to America, or of an article to be delivered in America after export from England,[35] or of articles to be manufactured from materials which have to be imported from abroad,[36] the problem is not so easy of solution, since certain courts have seen fit to make a very uncertain element, namely, the probable length of the duration of the embargo, a controlling circumstance.

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[32]The leading English case on this point is in accord in principle. Leiston Gas Co. *v.* Leiston-cum-Sizewell Urban District Council (1916) 2 K. B. 428. The defendant, having contracted to buy a certain minimum quantity of gas from the plaintiff (who had installed an expensive plant in the town) was held liable for that amount even after enemy operations and government defensive measures had caused the lighting of lamps to be forbidden. But the purchase of gas which, rather than the lighting of lamps, was the performance undertaken by the defendant was still legal.

Both of these cases are in seeming conflict with Krell *v.* Henry (1903) 2 K. B. 740, but this is a necessary result where the *ratio* (which, we have submitted, is a theory of disturbance of balance) involves inevitably the determination of questions of degree. In the Palmer case the defendant could still light his sign once a week; in the Leiston case the defendant could still burn gas indoors.

In Scottish Nav. Co. *v.* Souter & Co. (1917) 1 K. B. 222, 237, Swinfen-Eady, L. J., said: "It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible and this effects a dissolution of the contract."

[33]*Cf.* American Mercantile Exchange *v.* Blunt (1906) 102 Me. 128, 66 Atl. 212; The Stratford, Inc. *v.* Seattle Brewing & Malting Co. (1916) 94 Wash. 125, 162 Pac. 31; Woodfield S. S. Co. *v.* Thompson & Sons (1919) 35 T. L. R. 527. In this last case, after defendant had undertaken to build a ship for plaintiff according to specifications, an executive order made it unlawful to build any but standard ships. Held, the contract is dissolved. See also Metropolitan Water Board *v.* Dick, Kerr & Co. (1918) A. C. 119.

[34]Andrew Millar & Co. *v.* Taylor & Co. (1916) 1 K. B. 402.

[35]Roessler & Hasslacher Chemical Co. *v.* Standard Silk Dyeing Co. (1918) 254 Fed. 777, certiorari denied (1919) 250 U. S. 663.

[36]E. Hulton & Co. *v.* Chadwick & Taylor (1918) 34 T. L. R. 230; Schofield & Co. *v.* Maple Mill (1918) 34 T. L. R. 423.

Andrew Millar & Co. v. *Taylor & Co.*,[37] was a case involving the sale of confectionery for export. After the contract had been made, the export of sugar was prohibited. The confectionery was made with sugar. The sellers thereupon cancelled their orders. Ten days later the ban on exporting sugar was lifted. The sellers when sued by the buyers for non-delivery alleged the contract had been dissolved by the prohibition. Though the High Court of Justice found for the sellers and ruled that the length of the embargo was immaterial,[38] yet the Court of Appeal directed a reversal, and held that the sellers should have waited a reasonable time before repudiating their contracts.

While on its facts this decision accomplishes no unjust results, yet, it is submitted, it involves the use of the wisdom that comes after the event, and erects no unequivocal criterion which parties may employ as a guide to future conduct.[39] To quote Lord Sumner:[40]

"In any case its application would lead to the interpolation of a period of suspense during which neither party could be certain of his rights until the course of events determined the speculation in one way or the other. As Scrutton, L. J. (then Scrutton, J.) well observes in *Embiricos* v. *Sydney Reid & Co.*,[41] 'commercial men must not be asked to wait until the end of a long delay to find out from what in fact happens whether they are bound by a contract or not' ".

A different and better rule was laid down in *Metropolitan Water Board* v. *Dick, Kerr & Co.*[42] In this case defendants-respondents undertook to construct a reservoir, but performance was interrupted by an order to cease work issued by the Minister of Munitions. The contract provided that if completion of the work was delayed by contingencies beyond the control of the par-

[37](1916) 1 K. B. 402.

[38](1915) Weekly Notes, 116.

[39] "Parties contemplating a commercial dealing consult a lawyer a hundred times in advance of action for every time they consult him, after the contract is made and broken, to represent them in litigation. What business men need is a rule of law which a lawyer can give them when they consult him and upon which they can act with ease and certainty." J. H. Beale, What Law Governs the Validity of a Contract, 23 Harvard Law Rev. 1, 264. And see Pound, Juristic Science and Law, 31 Harvard Law Rev. 1047, n. 24.

[40]Watts, Watts & Co *v.* Mitsui & Co. (1917) A. C. 227, 245.

[41](1914) 3 K. B. 45, 54.

[42](1918) A. C. 119.

ties, the plaintiff's engineer might grant an extension of time. But the House of Lords held that the order in question dissolved the contract. The Lord Chancellor, Finlay, said:

"This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labour and material required for purposes immediately connected with the war. * * *

"The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all conditions as regards labour and materials may be absolutely different."[43]

In short, while performance may be excused while the prohibition lasts, yet dissolution of the contract is effected only if the causes of the prohibition are causes whose duration is speculative,[44] or if the circumstances under which performance would eventually again become permissible would be absolutely different[45] from the circumstances existing during the period in which, in the normal course of events, performance would have taken place.

There are few reported American decisions bearing on embargoes as a defense to an action for breach of contract.

In *Thaddeus Davids Co.* v. *Hoffmann-La Roche Chemical Works,*[46] the seller was sued for non-delivery of carbolic acid. The contract provided that contingencies beyond the control of the parties should allow cancellation of the contract. When the war broke out embargoes were placed upon the exportation of carbolic acid by various European countries. The buyer was willing to accept domestic products, but the contract was silent on the matter

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[43] *Ibid.*, pp. 125-126.

[44] "It is impossible for any court to speculate as to the duration of the war". Per Viscount Haldane, Tamplin S. S. Co. *v.* Anglo-Mexican Petroleum Products Co. (1916) 2 A. C. 397, 411. See also a similar observation by McKenna, J., in Allanwilde Transport Corporation *v.* Vacuum Oil Co. (1919) 248 U. S. 377, 386, 39 Sup. Ct. 147.

[45] See Jackson *v.* Union Marine Ins. Co. (1874) L. R. 10 C. P. 125 and observations on the *ratio decidendi* of this case in Mackinnon, Effect of War on Contract, 14. See, further Erdreich *v.* Zimmermann (1919) 190 App. Div. 443, 451, 179 N. Y. Supp. 829; Earn Line S. S. Co. *v.* Sutherland S. S. Co. (C. C. A., 2nd Cir. 1920) 63 N. Y. L. J. 1.

[46] (1917) 178 App. Div. 855, 166 N. Y. Supp. 179, reversing (1916) 97 Misc. 33, 160 N. Y. Supp. 973.

and did not stipulate for imported products. Held, the seller's non-performance is not excused.[47]

In *Roessler & Hasslacher Chemical Co.* v. *Standard Silk Dyeing Co.*,[48] the seller sued on a contract to supply dyestuffs entered into in 1915 (for delivery during 1915) containing a proviso excusing seller from liability if performance should be prevented by "causes beyond their control, including * * * war." A British Order in Council forbade the export of dyestuffs from Germany. Held, reversing the court below,[49] the seller is excused from further performance.

There is, nevertheless, nothing in the *Roessler* case to upset the general rule that intervening illegality caused by change in foreign law is no defense to an action for breach of contract.[50]

2. License Requirements.

If the governmental action assumes the form, not of an absolute prohibition, but of an imposition of a license requirement, the result is that the party whose performance thus becomes conditioned must assume the burden of attempting to get a license. If the license is refused, the rules are the same as in cases of absolute prohibition.

In *Anglo-Russian Merchant Traders* v. *Batt & Co.*,[51] Viscount Reading said:

"In my opinion the implied obligation is no higher than that the sellers shall use their best endeavors to obtain a permit. * * *

"The buyers contend that the implied obligation is that the sellers will obtain a license to ship, and that if they do not they will pay damages. That is to say, that the obligation to ship is absolute.

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[47]Accord, Southern Rice Sales Co. *v.* Held (1917) 56 N. Y. Law. Journ. 1913; Richards & Co. *v.* Wreschner (1915) 156 N. Y. Supp. 1054, aff'd on opinion below, (1916) 174 App. Div. 484, 158 N. Y. Supp. 1129; Thomson & Stacy Co. *v.* Evans, Coleman & Evans (1918) 100 Wash. 277, 170 Pac. 578.

See, however, Davison Chemical Co. *v.* Baugh Chemical Co. (1918) 133 Md. 203, 104 Atl. 404, decision modified (1919) 106 Atl. 269.

[48](1918) 254 Fed. 777, certiorari denied (1919) 250 U. S. 663.

[49]The District Court had held the seller liable on the ground that "war" meant a war in which the United States might be a party. (1917) 244 Fed. 250.

[50]Tweedie Trading Co. *v.* McDonald (1902) 114 Fed. 985. See, however, The Adriatic (1919) 258 Fed. 902; Earn Line S. S. Co. *v.* Sutherland S. S. Co. (C. C. A., 2nd Cir. 1920) 63 N. Y. L. J. 1.

Cases on the effect of requisitions on time charter-parties and other contracts are discussed *infra*, Sub-sec. 4.

[51](1917) 2 K. B. 679, 685-686.

In my opinion, if it were an absolute obligation, it would be contrary to the law of England which governs the case. There was at the time of making the contract, and at all material times, a prohibition against the export of aluminum except under a license. If a license cannot be obtained aluminum cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a license was or was not obtained. A party to a contract may warrant that he will obtain a license, but no such term can be implied in this case."[52]

If the license requirement does not affect the party's obligation under the contract but only the value to him of the other party's performance, his inability to obtain a license is no reason for repudiating the contract. Thus in *Cooper* v. *Mundial Trading Co.*,[53] the buyer's purpose to export to British Columbia was frustrated by his inability to procure from the United States Government the necessary export license. But his obligation to receive and pay for the goods subsisted, and he was held liable for a breach of it. The case is analogous to *Federal Sign Co.* v. *Palmer*.[54]

3. Price Fixing.

We now come to cases where governmental action has affected not the legality or permissibility of performance but the amount of performance.

If the War Labor Board orders[55] a traction company to grant

[52]See also Mitchell Cotts & Co. *v.* Steel Bros. & Co. (1916) 2 K. B. 610, which held the charterer liable to the owners of a vessel for delay due to charterer's inability to procure the requisite government license to discharge a cargo of rice at the Piraeus, the *ratio decidendi* being (p. 614) that the charterer "undertakes that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the owner" and, presumably, obtaining his assent.

[53](1918) 105 Misc. 58, 172 N. Y. Supp. 378, aff'd. without opinion (1919) 188 App. Div. 919, 176 N. Y. Supp. 894. *Cf.* Commoss *v.* Pearson (1920) 90 App. Div. 699, 180 N. Y. Supp. 482.

[54]*Supra*, footnote 31.

[55]Its recommendations have, as a practical matter, the force of orders. The Court in Columbus Ry. Power & Lt. Co. *v.* City of Columbus (1918) 253 Fed. 499, aff'd. (1919) 249 U. S. 399 uttered a *dictum* on the proper construction of the Lever Act (40 Stat. 276, § 12) and said (p. 510): "If something is not done, no gift of prophecy is required to foresee that the recommendation of the National War Labor Board will be acted upon, namely, that the President of the United States, as Commander in Chief of its armed forces, by virtue of the powers inherent in his office and con-

an increase of wages to its employees, the rate provisions in the company's franchise remain in force.[56] This is because the governmental action does not operate upon any of the terms of the contract between the city and the company. But if B and S make a contract for the sale of a commodity at one price and the government prescribes another price, the situation may not be without important legal consequences.

Practically all the American cases on price fixing have arisen in consequence of the Lever Act,[57] which authorized the President to fix prices of coal, copper, wheat and other articles of peculiar importance in war-time.[58] The twenty-fifth section of the Act[59] provides:

"The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith prior to the establishment and publication of maximum prices by the commission."

This section has prevented the rise of controversies over the enforcibility of pre-existing contracts in which a definite price was stipulated.

The case of *Boret* v. *Vogelstein & Co.*,[60] held that, if the parties to the contract provided for sale at market prices as shown by the publication of a list of market prices in a specified trade periodical, the fact that market prices are henceforth prices fixed by the government does not dissolve the contract. The Court said:[61]

"The contract was entered into after all the great powers except the United States had become involved in the war with Germany. It was to extend eight years. The parties must have contemplated

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ferred by Congress, will seize and operate the street railway at rates yet to be fixed. Such a shifting of duty and of responsibility would not be creditable to the people of a self-governing city, nor to the business management of an efficient public service corporation."

[56]Columbus Ry. Power & Lt. Co. *v.* City of Columbus (1919) 249 U. S. 399, 414.

[57]40 Stat. 276, August 10, 1917. For an account of the action of various administrative boards thereunder, see L. H. Haney, Price Fixing in the United States During the War, 34 Pol. Sci. Quar. 104, 262, 434. Note also 39 Stat. 213, 39 Stat. 649 and 39 Stat. 1168.

[58]The power to fix prices of such articles is within the war powers of the President. United States *v.* Pennsylvania Central Coal Co. (1918) 256 Fed. 703.

[59]40 Stat. 286.

[60](1919) 188 App. Div. 605, 177 N. Y. Supp. 402.

[61]*Ibid.*, p. 611.

that unusual and abnormal market conditions would be occasioned by the war, and that there was a possibility of the United States becoming involved, and that the performance of the contract might have been rendered difficult or burdensome."[62]

Another question arises when a jobber who has acquired a quantity of coal at a figure in excess of a subsequently fixed price and who at the time of the price fixing has made no contracts for the resale of his coal, proposes to make a contract for its sale at a figure in excess of the fixed price. Paragraph 11 of the Fuel Administration Regulations, October 6, 1917, allows resale under such conditions at a price which shall not exceed the fixed price by any amount other than the jobber's commission, the commission itself being fixed by executive order of August 23, 1917. Is the regulation valid?

A justice of the City Court of New York declared *obiter* that it was not, saying:

"* * * I think it is only proper for me to say that in my judgment, such a regulation could not be deemed retroactive; but if it is so unfortunately worded as to imply that it is retroactive, then and in that event it must be held void and illegal and contrary to the congressional act of August 10, 1917, and the executive orders thereunder. I have studied with some care both the congressional act and the executive orders of the President, but I cannot find anything in them which could compel legitimate jobbers in fuel to sell coal at prices less than the purchase prices *bona fide* paid by the said jobbers to the mines. If there were anything in them to that effect, it would be void and unconstitutional."[63]

4. Requisitions.

The situation is different where the government has exercised its power[64] to requisition property, such as ships or factories.

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[62]The case contains (p. 612) the following *dictum*: "If the contract had fixed the price of copper at a higher figure than twenty-three and one-half cents and the government of the United States had thereafter legally fixed the price at twenty-three and one-half cents and forbidden sales at any other price, the contract would have been rendered illegal and unenforcible." It is submitted that the *dictum* disregards Sec. 25 of the Lever Act, *supra*, footnote 59. See also Majestic Coal Co. *v.* Bush & Co. (1918) 171 N. Y. Supp. 662, *infra*, footnote 63.

[63]Majestic Coal Co. *v.* Bush & Co. (1918) 171 N. Y. Supp. 662, 667. See also West Virginia Traction & El. Co. *v.* Elm Grove Mining Co. (1918) 253 Fed. 772, 776; Lysle Milling Co. *v.* Sharp (Mo. App. 1918) 207 S. W. 72; Mario Tapparelli Co. *v.* Gosselin Corp. (1919) 174 N. Y. Supp. 636.

[64]See Morris Cohn, Power of the United States in War-Time as to Taking Property, 53 Amer. Law Rev. 87.

Cases arising from such governmental action are to some extent analogous to the cases on prohibitions. It might well be said of *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[65] that there the government had requisitioned all the labor and materials so that it was impossible as a matter of law for the defendant to perform. The words of Finlay, L. C., already quoted,[66] are quite apposite here. But an important difference is that in the prohibition cases performance is made illegal, whereas in the requisition cases it is not rendered illegal but, by reason of the transfer of certain property from the party's control into that of the government, it tends to become impossible.[67]

Whether impossibility as a matter of law may properly be said in a particular case to have resulted depends on the duration of the requisition (whether the *res* can be or is likely ever to be restored to its owner), the effect of the lapse of time upon the contract, and on the degree of approximation of the circumstances likely to be prevailing when, if ever, performance again becomes possible, to those prevailing just prior to the requisition.

In *Tamplin S. S. Co.* v. *Anglo-Mexican Petroleum Products Co.*,[68] a time charter-party entered into December 4, 1912, to run five years was held not dissolved by the fact that the Admiralty had requisitioned the vessel in December, 1914, and converted her into a troop-ship by making extensive alterations. Their Lordships were divided three to two. Earl Loreburn (with whom Parker, L. J., and Buckmaster, L. C., concurred) said:[69]

"Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight

[65](1918) A. C. 119, *supra*, footnote 42.

[66]*Supra*, footnote 43.

[67]See Earn Line S. S. Co. *v.* Sutherland S. S. Co. (C. C. A., 2nd Cir. 1920) 63 N. Y. L. J. 1. The analogy to cases where property has been destroyed does not truly exist unless the property requisitioned is to be consumed, *e. g.*, when it is grain.

[68](1916) 2 A. C. 397.

[69]*Ibid.*, p. 405.

he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer."[70]

The *Tamplin* case was distinguished in *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[71] Lord Dunedin saying:

"No one was hurt by the continuance of the charter, and if the Government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable. But suppose the facts had been slightly different. Suppose the Government had taken the ship, and had said they would pay nothing—a proceeding within their powers[72]—and then suppose that the owner had sued the charterer for the hire during the period while the Government kept the ship. What then? I may be wrong but it seems to me it would have fallen within the lines of *Horlock* v. *Beal*."[73]

It is significant that in the Tamplin case it was the owner who brought a special case to have the contract declared dissolved. As the Government award could under English law have been apportioned between owner and charterer,[74] it is arguable that there was no sufficient disturbance of balance to cause a dissolution of the contract. But the vital factor was the likelihood that the ship would some day be turned back to her owners; and the court seemed to think that as the charterer evinced a desire to chance it, and as the owner could not possibly be harmed by such conduct, the charterer's interest in the contract should not be cut off against his will.[75]

It is also significant that at the time of the requisition the

[70]Accord, Modern Transport Co. *v.* Duneric S. S. Co. (1917) 1. K. B. 370.

[71](1918) A. C. 119, 129, *supra,* footnote 42.

[72]See W. S. Holdsworth, Power of the Crown to Requisition British Ships, 35 Law Quarterly Rev. 12.

[73](1916) 1 A. C. 486. This case held that the hostile detention of a British ship at Hamburg dissolved seamen's contracts.

[74]Apportionment is proper if the charter is suspended and not dissolved. Chinese Mining & Engineering Co. *v.* Sale & Co. (1917) 2 K. B. 599. See also British Berna Motor Lorries Ltd. *v.* Inter-Transport Co. (1915) 31 T. L. R. 200.

[75]The contention that this is an instance of the sporting theory of justice cannot be denied.

To give the charterer alone, and not the owner, the right to disaffirm was called "obviously unfair" in Earn Line S. S. Co. *v.* Sutherland S. S. Co. (1918) 254 Fed. 126, 132, aff'd. (C. C. A., 2nd Cir. 1920) 63 N. Y. L. J. 1.

charter had still several years to run. In a later case, Bailhache, J., made the following observation:[76]

"Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charter-party depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter-party."[77]

In *Heilgers & Co.* v. *Cambrian Steam Navigation Co.*,[78] the ship was requisitioned three months after it had entered on the charter, the duration of which was to be about fifteen months. The charterer, learning that the Government was paying the owner a sum in excess of the rate named in the charter-party sued to have the contract declared still in existence and to compel defendant to pay to the plaintiff the difference between the government rate and the contract rate. The High Court of Justice[79] held that the doctrine of frustration of adventure applied and that the action failed. The Court of Appeal dismissed the appeal.

But if the parties, foreseeing the possibility of a requisition, provide that the duty upon the charterer to pay hire "shall cease for such period", a subsequent requisition will not dissolve the contract but will merely suspend it.[80]

In *Skipton, Anderson & Co.* v. *Harrison*,[81] a specific parcel of wheat was the subject of an executory contract of sale. It was held that the contract was dissolved by the action of the Govern-

[76]Anglo-Northern Trading Co. *v.* Jones (1917) 2 K. B. 78, 84. The Court of Appeal affirmed the decision, substantially on the opinion of the court below: (1918) 1 K. B. 372.

[77]Bailhache, J., went on to say: "The question would thus be: What estimate would a reasonable man of business take of the probable length of the withdrawal of the vessel from service with such materials as were before him, including, of course, the cause of the withdrawal? And it would be immaterial whether his anticipation were justified or falsified by the event."

[78](1917) 34 T. L. R. 72.

[79](1917) 33 T. L. R. 348.

[80]Omnium d'Entreprises *v.* Sutherland (1919) 1 K. B. 618. It is difficult to reconcile this case with the earlier case of Bank Line *v.* Capel & Co. (1919) A. C. 435, which held that requisition dissolved a charter-party made in 1915 and containing a proviso to this effect: "Charterers to have option of cancelling this charter-party should steamer be commandeered by Government during this charter." The proviso was construed not to mean that the consent of charterer was necessary to cancellation.

[81](1915) 3 K. B. 676. Accord, Lipton *v.* Ford (1917) 2 K. B. 647. Compare Salembier, Levin & Co. *v.* North Adams Mfg. Co. (1919) 178 N. Y. Supp. 607; Crown Embroidery Works *v.* Gordon (1920) 190 App. Div. 472, 180 N. Y. Supp. 158; Barish *v.* Brander (1920) 180 N. Y. Supp. 447; Atlantic Steel Co. *v.* Campbell Co. (1919) 262 Fed. 555.

ment in requisitioning the wheat before the time for the passing of title to the buyer.

The English cases draw a distinction between voyage and time charter-parties, and are more disposed to hold[82] that dissolution results from requisition in the case of a voyage[83] than in the case of a time charter-party. A recent Federal decision,[84] however, holds that both types of charter-parties are governed by the same rule, the Court (Rose, D. J.) phrasing the rule as follows:

"That in one case, as in the other, the question is whether, after the government has acted, the contract is still capable of execution in such a way that the purpose of neither party in making it has become in a substantial sense impossible. If it is, the contract still lives, although some adjustment of rights under it may be required."[85]

In the last analysis, it is submitted that the Lord Chancellor's words in *Metropolitan Water Board* v. *Dick, Kerr & Co.*, already quoted,[86] are an expression both sound in principle and accurately reflective of the present state of the law. In harmony with them is the following statement of Bradley, J., in *New York Life Insurance Co.* v. *Statham*:[87]

"The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."[88]

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[82]Relying on the decision in Jackson *v.* Union Marine Ins. Co. (1874) L. R. 10 C. P. 125. And see Jurid. Rev. 104.

[83]Lloyd Royal Belge Société Anonyme *v.* Stathatos (C. A. 1917) 34 T. L. R. 70. But see Bank Line Capel Co. *supra*, footnote 80.

[84]The Isle of Mull (1919) 257 Fed. 798. This case is opposed to Farm Line S. S. Co. *v.* Sutherland S. S. Co. (C. C. A., 2nd Cir. 1920) 63 N. Y. L. J. 1, holding time charter dissolved by requisition.

[85](1919) 257 Fed. at p. 803.

[86]*Supra*, footnote 43.

[87](1876) 93 U. S. 24, 32. The Justice indulges in the following *reductio ad absurdum*: "If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat on a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards and after the return of the expedition?" 93 U. S. at p. 32. See also cases cited in footnote 45, *supra*.

[88]See also C. N. Gregory, Effect of War on the Operation of Statutes of Limitation 28 Harvard Law Rev. 673.

Cases involving the dissolution of executory contracts with persons becoming alien enemies prior to completion of performance are dealt with in Trotter, Contracts During and After War (3rd ed.) 61-92.

5. PREFERENCES.

The Navy Appropriation Act[89] empowers the President, in time of national emergency, to place orders for war material with any person, if the materials are of the sort usually produced or capable of being produced by such person; and "compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person." The National Defense Act, Section 120,[90] employs practically identical language in regard to supplies for the Army.[91]

These provisions have given rise to but a small number of cases, owing largely, it may be assumed, to the fact that parties whose contracts were affected by governmental action under these statutes "appear to have treated losses thus caused them as part of the fortunes of war."[92]

Just as requisitions resemble prohibitions in their legal consequences, so cases involving preferences to be given to government contracts resemble cases where the legality of a contract is conditioned upon the grant of a license. Compulsory preferences involve a sort of qualified illegality: the contract is not illegal so long as the parties perform for the government before performing for each other. The government may be said to have requisitioned the parties' time just as in *Metropolitan Water Board* v. *Dick, Kerr & Co.*,[93] it may be said to have requisitioned the labor which the parties proposed to employ. These analogies are dwelt on to facilitate the application of established principles to situations which, when they arose in this country in 1917, were considered almost wholly uncontrolled by precedent.

In *Moore & Tierney* v. *Roxford Knitting Co.*,[94] the plaintiff

[89]39 Stat. 1168, 1193, March 4, 1917. The wisdom of hiding general laws of this sort in appropriation acts is at least dubious. See Attorney-General Caleb Cushing's remarks, In re Term of Judicial Salaries, 7 Opinions of Attorneys-General 303, 306 (1855).

[90]39 Stat. 166, 213, June 3, 1916.

[91]See also 40 Stat. 276 (*supra*, footnote 58), 40 Stat. 556 and 40 Stat. 634.

[92]E. M. Dodd, Impossibility of Performance of Contracts Due to War-time Regulations, 32 Harvard Law Rev. 789.

It is a curious fact that most manufacturers were so eager to lay aside everything for government contracts that they did not wait for the government to resort to the force which the statutes furnished. A New York Court, in Mawhinney *v.* Milbrook Woolen Mills (1918) 105 Misc. 99, 172 N. Y. Supp. 461, has seen fit to penalize this docility.

[93]*Supra*, footnote 42.

[94](1918) 250 Fed. 278.

sued for the price of goods sold and delivered in partial performance of its contract.. The defendant put in a counterclaim for damages caused by plaintiff's failure to perform the entire contract. The plaintiff answered the counterclaim by saying that further performance had been prevented by the duty of executing government contracts placed under the Navy Appropriation Act.[95] The answer was held good and judgment awarded in favor of the plaintiff's claim and against the defendant on the counterclaim.

The real issue in the case was what constituted placing an order. The Court held that a courteous letter from a member of the Board of National Defense, politely requesting the plaintiff not to answer that it was sold up but to state the productive capacity of its plant, adding that the government was desirous of obtaining underclothes for men in the Navy, was, when followed by a contract made as between business men without any express references to statutes, a placing of an order under the statute.[96]

The case of *Mawhinney* v. *Millbrook Woolen Mills*,[97] arose out of a contract for Army material, and the National Defense Act[98] was relied on as a defense. The Government contract the execution of which caused the defendant to be unable completely to perform its contract with the plaintiff, was made in a letter signed by the Secretary of War, accepting an offer and closing with the following language:

"You are further directed to utilize all machinery under your control exclusively in the production of cloth contracted for the use of the government, and, as required by section 120 of the act of June 3, 1916 (39 Stat. 213), you are hereby required, in filling this order, to give preference thereto over all work for parties other than the United States government, without regard to the order or date of contracting therefor."

The Court held that the order was not a compulsory one under the statute and that the defendant was liable, saying:[99]

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[95]39 Stat. 1193, *supra*, footnote 89.

[96]The Court went on to say (p. 286): "I do not think it was necessary for the plaintiff to put itself in a position of seeming unwillingness to aid the government, or of being recalcitrant. Nor do I think it was necessary for the government to say: 'This is a command, which must be obeyed and given under the National Defense Act and Navy Appropriation Act.'"

[97](1918) 105 Misc. 99, 172 N. Y. Supp. 461, aff'd. without opinion (1919) 188 App. Div. 971, 176 N. Y. Supp. 910, motion for reargument or for leave to appeal denied without opinion, (1919) 188 App. Div. 991, 177 N. Y. Supp. 920.

[98]39 Stat. 166, 213.

[99](1918) 105 Misc. 99, 107, 172 N. Y. Supp. 461, 465.

"It is suggested in a tentative way that the making of a contract is 'in ordinary parlance', the 'placing of an order'. It is probably so in commercial colloquialism, and an overlooked instance is in the contract upon which the plaintiff sues, and which states the conditions under which 'this order is placed'. But Congress did not have the colloquialism in mind. Resort to the presumption against loose verbal usage in the interpretation of a solemn statute is not needed. Explicitly and repeatedly it is made manifest that orders placed under the statute are to be something extraordinary, something 'in addition to the present authorized methods of purchase and procurement'. The very terms bar the inference of an intent to include a purchase by ordinary contract as being the placing of an order under the section. The contracts here were ordinary contracts, negotiated and closed in pursuance of an ordinary and established method of governmental purchasing."

No attempt will be made to reconcile a case holding reference to the statute needless with a case holding it not enough. The best criticism of the *Mawhinney* case is, perhaps, the general observation of Van Fleet, D. J., in *Nash* v. *Southern Pacific Co.*,[100] to the effect that emergency legislation should be construed, "not with that meticulous nicety which might be dictated by other circumstances, but in a broad spirit of liberality, in keeping with the purpose intended to be accomplished and having in view its emergency character."

Another New York case arising out of Federal emergency legislation is *North Hempstead* v. *Public Service Corporation*.[101] This was an action for damages for failure to construct, pursuant to contract, a pipe line along a street of the plaintiff town. The defense was the inability of the defendant to procure from the Priorities Board and the War Industries Board of the Council of National Defense priority orders without which, owing to the government's assumption of control of the steel and pipe industries, obtaining pipe was impossible. The contract antedated the statute[102] creating the Council of National Defense. Held, the statute and the action of the Boards thereunder rendered performance more difficult, but did not render it impossible;[103] and that the defendant must respond in damages.

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[100](1919) 260 Fed. 280, 284.

[101](1919) 107 Misc. 19, 176 N. Y. Supp. 621.

[102]39 Stat. 649.

[103]Compare cases cited *supra,* footnotes 24, 25, 26.

Considerations of space render it necessary to abridge to a mere outline the treatment of cases illustrative of express suspension of remedial rights as a form of governmental action under Part II, *supra*. The English authorities are omitted.

MORATORIA.—Probably the first appearance of this phenomenon in legal writings is in the *Coutume de Beauvaisis* of Beaumanior (1283), where the author seeks Roman Law precedents for the right of a king starting on a crusade to suspend the fulfilment of obligations for knights joining his army. Vinogradoff, Roman Law in Mediaeval Europe 82. See also E. G. Lorenzen, Moratory Legislation Relating to Bills and Notes, 28 Yale Law Journ. 324; and see 12 Corpus Juris 1078; 28 Harvard Law Rev. 407; 30 Ibid., 390; 22 Dom. Law Rep. 865, annotating the case of Chapman *v.* Purtell (1915) 25 Manitoba 76, 22 Dom. L. Rep. 860.

In Foster *v.* Compagnie Française de Navigation à Vapeur (1916) 237 Fed. 858, an action for refund of passage money, defendant carrier's inability to draw money out of bank owing to French moratorium law was held no defense. Goldmuntz *v.* Spitzel (1915) 91 Misc. 148, 154 N. Y. Supp. 1054 was a suit upon a note made in Belgium by parties who at the time resided and did business there; it was held that the Belgium moratorium proclamation postponed the date on which the note was due, thereby affecting the right of the plaintiff and not merely his remedy, so that the defendant was not liable. Accord, Goldmuntz *v.* Spitzel (1916) 170 N. Y. Supp. 467; Taylor *v.* Kouchakji (1916) 56 N. Y. L. J. 813. In Post *v.* Thomas (1918) 183 App. Div. 525, 170 N. Y. Supp. 227, the appellant, a member of the naval forces of the United States, was held entitled by virtue of 40 Stat. 442, to stay of argument of appeal where failure to win would subject him to heavy liability for costs. Dietz *v.* Treupel (1918) 184 App. Div. 448, 170 N. Y. Supp. 108, held that since the liability of a sailor, who had gone on a bond accompanying mortgage, for the deficiency upon foreclosure, was contingent, it was no reason for granting a stay under 40 Stat. 442. Hewitt *v.* Dredge (1916) 133 Minn. 171, 157 N. W. 1080, held that the fact that the foreclosure of a mortgage on Manitoba land is prevented by a provincial mortatorium law is no defense to an action on notes given for interest on the mortgage. Among cases involving exercise by the courts of the discretion to grant or refuse a stay conferred on them by 40 Stat. 440 are the following: Davies & Davies *v.* Patterson (Ark. 1919) 208 S. W. 592; State *ex rel* Clark *v.* Klene (Mo. App. 1919) 212 S. W. 55; Gilluly *v.* Hawkins (Wash. 1919) 182 Pac. 958. On the need of a mortgagee for the protection of a decree of court in foreclosing, even where no interest of any person in military service is discoverable upon the records, see Morse *v.* Stober (1919) 233 Mass. 223, 123 N. E. 780.

Two recent cases show a conflict of judicial opinion on the question whether 40 Stat. 440 has superseded all State relief acts. Konkel *v.* State (1919) 168 Wis. 335, 170 N. W. 715, holds that it has. Pierrard *v.* Hoch (Ore. 1919) 184 Pac. 494, holds that it has not. In Thress *v.* Zemple (N. D. 1919) 174 N. W. 85, the Court gave effect to a State moratorium law, the majority opinion passing over the constitutional question *sub silentio*. But one judge dissented on the alternative ground that the statute either amounted to an unconstitutional impairment of the obligation of contracts, or had been superseded by Congressional legislation on the subject. (40 Stat. 440).

SUSPENSION OF RIGHT TO FORECLOSE OR DISPOSSESS.—In Pierrard *v.* Hoch (Ore. 1919) 184 Pac. 494, it was held that a state law forbidding mortgagees to foreclose during the war and for sixty days thereafter in cases where the mortgagor is in the military service of the United States, was constitutional. The Court relied on the learned opinion of Woodward, J., in Breitenbach *v.* Bush (1863) 44 Pa. St. 313. In Maxwell *v.* Brayshaw (1919) 258 Fed. 957, the Court construes 40 Stat. 593, prohibiting proceedings to eject tenants of District of Columbia realty so long as they

continue to pay rent at present agreed rate unless the landlord, or a bona fide purchaser of his interest, desires to occupy premises personally when present lease ends, such landlord or purchaser being a government employee. Whether this compulsory prolongation of existing leases is constitutional has not yet been passed upon by any court.

FEDERAL CONTROL OF RAILROADS.—Section 10 of the Federal Control Act (40 Stat. 451, 456), provides: "That carriers while under federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control."

Three of the General Orders of the Director-General of Railroads have caused much litigation.

(1) G. O. No. 18 ordered that suits against carriers should be brought either in the county where the cause of action arose, or in the county where the plaintiff resided at the time the cause of action arose. In Rhodes *v.* Tatum (Tex. Civ. App. 1918) 206 S. W. 114, it was held that this order was valid, though cause of action arose before Federal control, on the ground that the order affects the remedy and not the right. Accord, Wainright *v.* Pennsylvania R. R. (1918) 253 Fed. 459. But West *v.* New York, N. H. & H. R. R. (1919) 233 Mass. 162, 123 N. E. 621, is directly *contra,* and holds the order void as impairing vested rights. In Friesen *v.* Chicago, R. I. & P. R. R. (1918) 254 Fed. 875 the Court held the order void as to causes of action arising under Federal control from acts of the railroad not in performance of its duties as a carrier. The plaintiff having been run down by a train was allowed to sue in other courts than those mentioned in G. O. No. 18. It seems that, if the cause of action were for breach of contract to carry, G. O. No. 18 would have been upheld.

(2) G. O. No. 26 modified G. O. No. 18, and provided that actions might be brought in any county in which they could lawfully have been brought prior to federal control; but it further provided that if actions were brought in other counties than those mentioned in G. O. No. 18, the Director General should, upon showing that the just interests of the government would be prejudiced by such action, be entitled to have the same stayed until after the end of federal control. Held, that the order is valid; Cocker *v.* New York, O. & W. Ry. (1918) 253 Fed. 676; Russ *v.* New York Central R. R. (1919) 190 App. Div. 37, 179 N. Y. Supp. 310. Held, it is void; Moore *v.* Atchison, T. & S. F. Ry. (1919) 106 Misc. 58, 174 N. Y. Supp. 60, aff'd., without opinion (1919), 189 App. Div. 906, 178 N. Y. Supp. 878. Held, it confers discretion on the Court which will grant a stay if convinced as to the possibility of prejudice to Government interests. Harnick *v.* Pennsylvania R. R. (1918) 254 Fed. 748.

(3) G. O. No. 50 provided that in actions accruing since December 31, 1917, against any carrier under Federal control the Director General may be substituted as defendant and the action dismissed as to the carrier. Held, the order is permissive only, and that a carrier cannot invoke it. Jensen *v.* Lehigh Valley R. R. (1919) 255 Fed. 795. Held that in so far as it purports to relieve the carrier from liability it is void. Lavalle *v.* Northern Pacific Ry. (Minn. 1919) 172 N. W. 918; El Paso & Southwestern R. R. *v.* Levick (Tex. Civ. App. 1919) 210 S. W. 283; El Paso & Southwestern Ry. *v.* Havens (Tex. Civ. App. 1919) 216 S. W. 444; *Contra,* Nash *v.* Southern Pacific Co. (1919) 260 Fed. 280. In Schumacher *v.* Pennsylvania R. R. (1919) 106 Misc. 564, 175 N. Y. Supp. 84, it was held that in so far as 40 Stat. 451 makes carriers liable for damages sustained by employees and others while the carrier is under Federal control it is violative of the Fifth Amendment and void. Accord, Haubert *v.* B. & O. R. R. (1919) 259 Fed. 361.

In Salant *v.* Pennsylvania R. R. (1919) 188 App. Div. 851, 177 N. Y. Supp. 475, it was held that in so far as Section 10 of 40 Stat. 451 is capable of being construed to deprive a bailor of the right to replevy

goods tortiously delivered to a carrier under Federal control by his bailee for transmission under an order bill of lading, it is unconstitutional and void.

In Bryant *v.* Pullman Co. (1919) 188 App. Div. 311, 177 N. Y. Supp. 488, motion for reargument denied (1919) 189 App. Div. 883, 177 N. Y. Supp. 912, it was held that an injured employee may sue his employer under the State Workmen's Compensation Law even though the employer was a carrier under Federal control at the time of the injury and at the time of suit. *Quaere,* whether this case can be reconciled with Schumacher *v.* Pennsylvania R. R., *supra.*

The legal relation of the Director General to the carrier is discussed in Missouri Pacific R. R. *v.* Ault (Ark. 1919) 216 S. W. 3.

As to the disposition after termination of Federal control of causes of action arising under Federal control, see Sec. 206 of the Transportation Act (1920) Public No. 152, 66th Congress (Comp. Stat. § 10071¼ cc.). And see Keene *v.* Hines (1920) 63 N. Y. L. J. 132.

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